No. 4222

United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

SIDNEY E. KNIGHT,

Appellee.

BRIEF OF APPELLANT.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

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STATEMENT OF CASE.

This is an appeal on the part of the United States from a decree rendered by the United States District Court for the District of Montana on the 11th day of August, 1923, (Tr. 28-29) in a suit wherein the appellant prayed for the cancellation of a certificate of citizenship issued to the appellee.

The complaint was filed on June 22, 1922 in the said court, and alleges, in substance, that the appellee on November 5, 1900, at Helena, Montana, was admitted to citizenship by the State District Court of Lewis and Clark County, and that ever since that date has been, and still is, a naturalized citizen of the United States; that prior thereto he was a subject of Great Britain; a duly certified copy of the order, admitting appellee to citizenship, was annexed to the complaint, and by reference made a part thereof; the complaint further alleged that within five years after the issuance of the certificate of citizenship, and on or about the month of September, 1901, the appellee went to South Africa, and in that month took and established a permanent residence in said foreign country (Tr. 2-3), and ever since the appellee has resided, and still resides, in South Africa.

The complaint then alleges that the certificate of citizenship was fraudulently and illegally procured by appellee, because, at the time the same was issued, he did not intend to become a permanent resident of the United States, but intended only to obtain such certificate as indicia of such citizenship in order that he might enjoy the rights and protection of a citizen of the United States, and yet within five years after procuring the certificate to take up and maintain a permanent residence in a foreign country.

There was a prayer for the cancellation of the certificate as fraudulent (Tr. 4).

On the date of the filing of the complaint, a subpoena in equity was duly issued (Tr. 7-9), and an affidavit for the publication of the subpoena (Tr. 10), and a praecipe for the service of the same by publication (Tr. 11) were filed with the Clerk of the Court, and on the same day an order for publication of subpoena was made by the Clerk (Tr. 12-13); and on the same day the Clerk of the Court forwarded, by registered mail, a copy of the bill of complaint and the subpoena to the appellee at Cape Town, Union of South Africa (Tr. 13-14); on July 19, 1922, an affidavit of publication of the subpoena was filed with the Clerk (Tr. 14-17); thereafter, and on June 16, 1923, an order pro confesso was duly filed and entered (Tr. 18-19), the appellee being in default for failure to appear in the suit.

Thereafter, and on July 18, 1923, the case came on for trial, the appellee being in default and not represented. The government introduced in evidence a certified copy of a certificate made by the American Vice-Consul at Cape Town, South Africa, which certificate was executed pursuant to Section 15 of the Act of June 29, 1906 (Tr. 36-37). Thereafter, and on August 1, 1923, the court rendered and filed its decision in the case (Tr. 19-28); and on August 11, 1923, the court

rendered, and there was filed, its decree in favor of the appellee and against the appellant, and dismissed the suit (Tr. 28-29).

ASSIGNMENT OF ERRORS.

Three specifications of error, relied upon by the appellant, are as follows:

I.

The Court erred in finding the evidence taken in said cause, at the hearing thereof, was insufficient to sustain the allegations of the bill of complaint herein.

II.

The Court erred in ordering a decree in favor of the defendant and against the plaintiff, dismissing plaintiff's bill of complaint.

III.

The Court erred in entering a decree in favor of defendant and against the plaintiff, dismissing plaintiff's bill of complaint.

ARGUMENT.

It is apparent that the sole question is whether or not the certificate of the Vice-Consul is sufficient. Under the circumstances admitted by the default of the appellee, it should be prima facie evidence of the lack of intention on his part to be-

come a permanent citizen of the United States at the time of his application for citizenship.

In its decision, the court finds that the service of a subpoena by publictioan on a citizen residing abroad, in an action of this character, is due process (Tr. 21). The statutes of Montana were followed in all respects relative to the service by publication of the subpoena.

The government contends that the certificate of the Vice-Consul, executed in conformity with Section 15 of the Act of June 29, 1906, is sufficient to establish prima facie evidence that the appellee lacked the intention to become a permanent citizen of the United States at the time of his application for citizenship.

Said Section 15 provides, in part, as follows:

> "If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancelation of his certificate of citizenship as fraudulent.

> and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship, and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship."

It is observed that the diplomatic and consular officers of the United States in foreign countries are required, from time to time, through the Department of State, to furnish the Department of Justice with the names of persons in their respective jurisdictions who have obtained certificates of citizenship in the United States, and who have taken up permanent residence in the country of their nativity or any other foreign country; and that such statements of such officers, duly certified, are made admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

It may well be argued that the statements required of such officers would fully comply with the provisions of the Act if they contained only the names of such citizens, so residing out of the United States, together with the bald conclusion of the officer that such persons were permanent residents

of the foreign country, of which the certifying officer was representing the United States in a diplomatic of consular capacity.

In the instant case, the Vice-Counsul's certificate goes beyond the apparent requirement of the statute and states the facts from which the certifying officer evidently draws his conclusion that the residence of the appellee in South Africa is permanent.

The certificate discloses that within about ten months after the appellee was naturalized, he went to Cape Town, South Africa, for the purpose of representing an American firm, and that he has constantly represented the said firm in South Africa ever since; that the appellee stated, under oath, in May, 1917, that he intended to return to the United States for permanent residence whenever his employers so desired. Clearly, his intention to remain in South Africa was for an *indefinite* period, for, if his employers never desired his return to the United States for permanent residence, it was his intention never to return to his adopted country.

The indefiniteness of his residence in South Africa brings the appellee squarely within the rule laid down in Gilbert v. David, 235 U. S. 561, 35 Supt. Ct. Rep. 164, in which case, Mr. Justice Day, speaking for the court, said:

"This matter of domicil has been often before this court, and was last under consideration in the case of Williamson v. Osenton, supra. In that case the definition of domicil, as defined by Mr. Dicey, in his book on "Conflict of Laws," 2d ed. 111, is cited with approval. There change of domicil is said to arise where there is a change of abode and 'the absence of any present intention to not reside permanently or indefinitely in the new abode.' Or, as Judge Story puts it in his work on "Conflict of Laws," 7th ed. sec. 46, page 41, 'If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicil, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return at some future period.' 'The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely' Price v. Price, 156 Pa. 617, 626, 27 Atl. 291."

See also Williamson v. Osenton, 232 U. S. 619, 34 Sup. Ct. Rep. 442

It should be borne in mind that at the time of the institution of this suit, the appellee had been residing in South Africa for almost twenty-one years and that that residence was commenced in

said foreign country within about ten months after he became an American citizen. It is rather curious and quite significant that in October, 1920, the appellee should call at the office of the American Consulate General at Cape Town, bearing a passport issued to him by the Government of the Union of South Africa, with a request for a visa to the passport to enable him to proceed to the United States. It further appears from the ceritificate of the Vice-Consul that in October, 1921, the appellee, an American citizen, declined to divulge the specific reasons for his application for a British passport in the preceding October, and that he admitted that he was not required to take an oath of allegiance to the British Crown, or to swear to the declaration made in applying for the passport. This is certainly strange conduct on the part of one who has, by naturalization as an American citizen, renounced forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty.

The appellee, according to the certificate, stated to the Vice-Consul that he did not know when he would return to the United States for permanent residence, and that he had voted on several occasions at elections in South Africa, and that he had acquired interests in local community affairs, and intended to take an active part therein during his residence in South Africa.

From the foregoing, it appears that the appellee

was acting in all respects as a British subject and exercising the franchise privilege of the citizens of South Africa. That, of itself, ought to be sufficient to show, at least prima facie, that his residence, in South Africa is permanent, and, taken in conjunction with the other facts stated in the certificate, and with the inferences that might properly be drawn therefrom, justifies the conclusion that it was his intention to reside permanently in South Africa when he first went there after procuring his certificate of naturalization.

While it is true that the statements provided for in Section 15 of the Naturalization Act are ex parte and extrajudicial, and, thus, as noted by Judge Bourquin (Tr. 25) invade the law against hearsay evidence, yet it is equally true that Congress has undoubted authority—within reasonable limits—to prescribe what shall be deemed competent and admissible evidence in a proceeding of this nature; and the courts have so held.

> "The statements of the Consular Agents and Consul are made evidence under section 15, and, although of course they are not on that account conclusive, Congress has the power to make them competent evidence, and, as such, the United States should be entitled to whatever probative force the tribunal in fact be for whom the issue arises may give them. Indeed, at common law, the statements of an

> official are admissible in evidence if they relate to acts within his person knowledge and recorded in the performance of his duty. While it is true that this would not come within those rules, it is nevertheless of a kind somewhat similar and not without the power of Congress in the exercise of its control over the rules of procedure and evidence. The statements of the Consul, therefore, are admissible. It may be a question whether anything but his mere conclusion upon the question of permanent residence is properly admissible under the Statute; but, so far as his other statements are concerned, they aid the defendant, who cannot therefore complain of the addition. . . . . "

United States v. Luria, 184 Fed. 643, 649.

The Luria case was appealed to the Supreme Court of the United States, which affirmed the decree setting aside and cancelling the appellant's naturalization certificate as fraudulently and illegally procured. In discussing the power of Congress to provide for the admissibility and competency of the Consular statements, required under Section 15, supra, the Court, speaking through Mr. Justice Van Devanter, said:

> "Objection is specially directed to the provision which declares that taking up a permanent residence in a foreign country within five years after the issuance of the certificate

shall be considered prima facie evidence of a lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, and that in the absence of countervailing evidence the same shall be sufficient to warrant the cancelation of the certificate as fraudulent. It will be observed that this provision prescribes a rule of evidence, not of substantive right. It goes no further than to establish a rebuttable presumption which the possessor of the certificate is free to overcome. If, in truth, it was his intention at the time of his application to reside permanently in the United States, and his subsequent residence in a foreign country was prompted by considerations which were consistent with that intention, he is at liberty to show it. Not only so, but these are matters of which he possesses full, if not special, knowledge. The controlling rule respecting the power of the legislature in establishing such presumption is comprehensibly stated in Mobile J. & K. C. R. Co. v. Turnispeed, 219 U. S. 35, 42, 43, 55 L. ed. 78, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463, 2 N. C. C. A. 243, as follows:

'Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both

civil and criminal cases, abound, and the decisions upholding them are numerous. . . . .

'That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

'If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.' (Citing a number of cases).

"That the taking up of a permanent residence in a foreign country shortly following naturalization has a bearing upon the purpose with which the latter was sought, and affords some reason for presuming that there was an absence of intention at the time to reside per-

manently in the United States, is not debatable. No doubt, the reason for the presumption lessens as the period of time between the two events is lengthened. But it is difficult to say at what point the reason so far disappears as to afford no reasonable basis for the presumption. Congress has indicated its opinion that the intervening period may be as much as five years without rendering the presumption baseless. That period seems long, and yet we are not prepared to pronounce it certainly excessive or unreasonable. But we are of opinion that as the intervening time approaches five years, the presumption necessarily must weaken to such a degree as to require but slight countervailing evidence to overcome it. On the other hand, when the intervening time is so short as it is shown to have been in the present case, the presumption can not be regarded as yielding to anything short of a substantial and convincing explanation. So construed, we think the provision is not in excess of the power of Congress."

Luria v. United States, 231 U. S. 9, 34 Sup. Ct. Rep. 10.

Resuming, the government contends that the certificate of the Vice-Consul, in the instant case, does not invade the rule against hearsay evidence, but that it is admissable and entirely competent to prove the permanent residence of the appellee in a foreign country within the period prescribed

by Section 15 of the Naturalization Act; and that, there being no countervailing evidence on the part of the appellee, the force of the presumptions arising from the facts contained in the certificate of the Vice-Consul warrants only the rational conclusion therefrom, that the appellee, at the time he procured his certificate of naturalization, did not intend to become a permanent citizen of the United States; and that, therefore, the decree of the lower court should be reversed, with directions to enter a decree herein in favor of the United State.

Respectfully submitted,

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